SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

SUPREME COURT, U.S.
FILED
SEP 11 1971

OCTOBER TERM, 1971

No. 71-218

RALPH GROUNDS, HENRY HITCH, et al., (Landowners), *Petitioners,*

vs.

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),

AND

SOCONY MOBIL OIL CO., INC., (MOBIL OIL CORPORATION substituted), et al., (Lessee-Producers), *Respondents.*

BRIEF OF RESPONDENTS ASHLAND OIL & REFINING COMPANY, CABOT CORPORATION, DORCHESTER GAS PRODUCING COMPANY, HELMERICH & PAYNE, INC. AND TEXACO INC. (Lessee-Producers), IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RALPH BROUNDS, HENRY HITCH, et al.,
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(Helex Group),

AND

SOUTH ATLANTIC OIL CO., INC., (MOBIL OIL EXPLORATION substituted), et al.,
(Lessee-Producers),
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS ASHLAND OIL & REFINING COMPANY, CABOT CORPORATION, DORCHESTER GAS PRODUCING COMPANY, HELMERICH & PAYNE, INC. AND TEXACO INC.

OPINIONS BELOW

The opinions delivered in the Courts below (A. 1, 144) are reported at 326 F.Supp. 619 (D. Kan.), and 441 F.2d 714 (10 Cir.).

JURISDICTION

Judgment adverse to petitioners in each of their appeals, affirming the District Court, was entered March 2, 1971. (A. 185).

On June 8, 1971, petitioners filed a motion for leave to file petition for rehearing out of time. (A. 187). The motion was denied June 9, 1971. (A. 192).

Jurisdiction is absent because the petition herein was not filed until August 12, 1971, more than ninety days after the judgment sought to be reviewed. 28 U.S.C. 2101 (c):

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

QUESTION PRESENTED

Do conventional oil and gas leases, admittedly authorizing production of gas from pressurized natural reservoirs in the earth, authorize production of the approximate one-half of one percent helium gas which is commingled with and a part of such gas, under the local law of Kansas, Oklahoma and Texas?

STATEMENT OF CASE

Helium is a noncombustible gas naturally occurring in gas reservoirs in the Hugoton-Panhandle Gas Field area in Texas, Oklahoma and Kansas. (A. 147). It composes

about one-half of one percent of the gas in the geological reservoirs from which the gas is produced. (A. 149). Production of the gas effluent requires production of all components of the gas, including helium gas, since separation of helium at the wellhead is not possible. (A. 150).

The United States commenced helium extraction in Texas in 1917, and, until 1960, was for practical purposes the sole extractor and seller of separated helium. (A. 148). During those years, the United States always relied on oil and gas leases as authorizing production of helium, and conveying title thereto. Hence, its contracts for helium supplies were made with lessee-producers who owned the oil and gas leases and produced the gas. (R. Vol. II, 529-537).

Pursuant to the Helium Act Amendments of 1960 (74 Stat. 918, 50 U.S.C. §§167 et seq.), the United States executed long term helium acquisition contracts with certain pipeline subsidiaries, which subsidiaries constructed helium separation plants, and separated the helium for sale to the United States. (A. 167-168).

The petition seeks review of the judgment below entered in six actions in the nature of interpleader (28 U.S.C. §1335), and in two other actions by landowners against the United States under the Tucker Act (28 U.S.C. §1346(a)(2)), and the Tort Claims Act (28 U.S.C. §1346(b)).

The interpleader actions were brought by pipeline and subsidiary companies (Helex companies), who extract and sell helium, against two classes of adverse claimants: (1) landowners who granted oil and gas leases, and (2) lessee-producers who own the leases and produce gas containing helium.

Respondents Ashland Oil & Refining Company, Cabot Corporation, Dorchester Gas Producing Company, Helmer-

ich & Payne, Inc. and Texaco Inc. are representatives of the lessee-producer class.

The interpleader fund consisted of the proceeds of sale of extracted helium by the Helex company plaintiffs. (A. 32, 146).

The basic issues below were (1) whether the oil and gas leases authorized lessee-producers to produce and market helium gas as well as other gaseous constituents produced by their gas wells, and (2) if so, whether lessee-producers were entitled to payment from the fund of a reasonable value for the helium contained in the natural gas delivered to Helex companies.

Lessee-producers were not parties to the two actions against the United States, although all actions were consolidated for trial. The issue in those two actions was the same as issue (1) above, i.e., do oil and gas leases cover helium?

The District Court after a lengthy trial found that helium gas was covered by the oil and gas leases, which leases intended to authorize production and sale of the gas, including the helium gas, produced from gaseous reservoirs below the surface of the earth. (A. 102). The Court of Appeals affirmed. (A. 164).

As to claims for helium payment by lessee-producers the Court of Appeals held that the lessee-producers were entitled to recover from the interpleader fund the reasonable value of commingled helium delivered by lessee-producers. (A. 145-146, 183). Lessee-producers conceded that royalty on payment for helium so recovered would be paid by them to the landowners who held the royalty interests in the leases. (A. 165).

The landowners, not satisfied with a royalty payment as specified by the leases, seek a determination that the leases do not convey title to the helium gas constituent.

ARGUMENT

Oil and Gas Leases Authorize Production of Helium Gas. The Decisions of the District Court and the Court of Appeals So Holding Are Not in Conflict with Any Other Decision, and Are in Accord with Other Cases.

The United States and other interested persons for more than 40 years relied on oil and gas leases as conveying title to helium gas produced as a part of gas effluent from gas wells. During that time, no litigant made claim that oil and gas leases did not authorize production of helium gas.

The first decision holding that an oil and gas lease covered and conveyed title to helium was *Navajo Tribe of Indians* v. *United States,* 364 F.2d 320 (Ct. Clms., 1966). The decision below is the second such case so holding.

Landowners' principal reliance for their contrary position is on *Panhandle Cooperative Royalty Co., et al.* v. *Cunningham, Ex's, et al.,* 42 Okl. Bar J. 1239 (App. 193), and on earlier cases in Oklahoma, referred to as the Oklahoma casinghead gas cases. These decisions are inapplicable. (A. 158).

In the Oklahoma casinghead gas cases, the Oklahoma court was concerned with an earlier form oil and gas lease with peculiar royalty provisions not found in the present leases. In those leases, a royalty was provided for oil produced from oil wells, and for gas produced from gas wells, but there was no provision for any royalty to be paid by the producer on casinghead gas, which is gas produced from an oil well along with the oil. The Oklahoma court held

in such circumstances that the lease did not cover the casinghead gas, there being no royalty provision for it. *Hammett Oil Company* v. *Gypsy Oil Company*, 95 Okla. 235, 218 Pac. 501 (1921); *George* v. *Curtain*, 108 Okla. 281, 236 Pac. 876 (1925); *Mullendore* v. *Minnehoma Oil Co.*, 114 Okla. 251, 246 Pac. 837 (1926); *Ludey* v. *Pure Oil Co.*, 157 Okla. 1, 11 P.2d 102 (1931).

When the Oklahoma court was faced with conventional leases, such as are involved in the present case, it held that casinghead gas was covered by the leases. In these leases, as in ours, there were provisions for royalty on "gas". Since casinghead gas from an oil well is gas, a royalty was provided, and the lease covered all gas. *Wilson* v. *King-Smith Co.*, 119 Okla. 256, 250 Pac. 90 (1926); *Musselem* v. *Magnolia Petroleum Co.*, 107 Okla. 173, 231 Pac. 526 (1924); *Paulter* v. *Franchot*, 108 Okla. 130, 235 Pac. 209 (1925); *Withington* v. *Gypsy Oil Co.*, 68 Okla. 138, 172 Pac. 634 (1918).

All the present leases provide for a royalty on "gas". It follows that, under long-settled principles of contract construction, helium gas produced as a constituent of the gas effluent, is covered by the leases.

Landowners seek to rely on *Panhandle Cooperative Royalty Co., et al.* v. *Cunningham, Ex's, et al.*, supra. This Oklahoma decision did not involve helium at all. The only point decided by the Oklahoma court involved a conflict between two groups of lessees, both of whom claimed right to mine certain hard minerals, such as copper, silver, gold and other metallic ores. One group claimed under a "Mineral Deed Special" which granted an interest in "all of the oil, gas and other minerals." The court construed that instrument as conveying only oil and gas, in view of various provisions therein, and not the hard minerals claimed by

the lessee. The hard minerals claimed are not produced as a part of the gas.

The other group claimed an interest in the hard minerals under a "Sale of Oil and Gas Royalty" which granted "oil, gas, coal and other minerals." In view of other provisions, the Oklahoma court held the instrument ambiguous, and remanded for introduction of parol evidence.

In the present case, Landowners were given every opportunity to present any evidence desired bearing on the intent of parties to oil and gas leases. There was no evidence presented that any landowner intended to reserve from the grant of the right to produce gas, the small percentage of helium gas which was a part of the gas in the same reservoir.[1]

The Court of Appeals pointed out the unrealistic nature of the Landowner claims:

> "In the final analysis, the effort of the Landowners is to write into the leases an exception or reservation which is not found in the executed instruments. They seek to except from the leases the helium which they cannot produce themselves. The only way to obtain value for the helium is to produce it, together with all other components of the gas, and run the gas through a separator. We will not import into the grants of oil and gas a subjective intent to convey only those components of the gas which comport to a subjective notion of the commercial end uses at the time of lease execution." (A. 163-164).

The so-called "general" intent in the leases to grant rights to all gas produced from the reservoir, as referred

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1. The only direct statement by any landowner in this Record admits that the lease covers helium. (R. Vol. V, 1545, LPX 199).

to by the Court of Appeals, is simply a recognition that the parties did intend to convey the right to produce all the gas, in light of the known surrounding facts that it was physically impossible to produce any of the gas without producing all of it. The royalty provisions are on "gas" without limitation. There is nothing in the leases which remotely suggests any intent to exclude a portion of the gas from the leasehold grant.

Jurisdiction Is Absent Because the Petition Was Not Filed Within Ninety Days After Entry of Judgment.

The judgment adverse to landowners on their appeals below was entered March 2, 1971. Landowners did not file a timely motion for rehearing. Instead, after the time had expired to file a motion for rehearing, landowners on June 8, 1971 filed a motion to permit filing a motion for rehearing out of time. (A. 187). The motion was denied. (A. 192). Landowners did not file the petition for certiorari until August 12, 1971, more than ninety days after the judgment below.

The denial of landowners' motion to permit the late filing of a motion for rehearing was discretionary (Rule 2 of Federal Rules of Appellate Procedure). Landowners fail to show any abuse of that discretion. The Oklahoma case decided on May 11, 1971 (*Panhandle Cooperative Royalty Co., et al.* v. *Cunningham, Ex's, et al.*), is not in conflict with the decision below, and presented no reason for the Court of Appeals to reconsider its decision.

The petition for certiorari is untimely, depriving this Court of jurisdiction.

CONCLUSION

The present decision is clearly correct. It is in accord with existing decisions, and does not conflict in any way with any federal or state decision.

The petition was not filed within ninety days as required by 28 U.S.C. §2101(c).

The petition should be denied, or dismissed for lack of jurisdiction.

Respectfully submitted,

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(MOBIL OIL CORPORATION substituted),
ET AL. (Lessee-Producers),
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

This brief in opposition is filed on behalf of the respondents Cities Service Oil Company, Gulf Oil Corporation, Mapco Production Company, Mobil Oil Corporation, Amoco Production Company, Diamond Shamrock Corporation, and The Superior Oil Company (Lessee-Producers).

OPINIONS BELOW

The opinion of the Court of Appeals (A. 144) is reported at 441 F.2d 704. The opinion of the District Court (A. 1) is reported at 292 F.Supp. 619. These opinions are accurately described in the petition.

JURISDICTION

This Court does not have jurisdiction to entertain the petition because it was not filed within the time allowed by 28 U.S.C. § 2101(c).

STATUTE INVOLVED

28 U.S.C. § 2101(c):

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

QUESTIONS PRESENTED

1. Is a petition for writ of certiorari untimely, under 28 U.S.C. § 2101(c), where such petition is filed more than one hundred fifty days after entry of judgment and no intervening petition was filed in the Court of Appeals asking rehearing of the judgment which this Court is now asked to review?

2. Was the Court of Appeals' denial of petitioners' motion for leave to file a petition for rehearing out of time in conflict with the decisions of other circuits or of this Court?

3. Did the Court of Appeals and the District Court correctly apply the local law of Texas, Kansas and Oklahoma in holding that conventional oil and gas leases, ad-

mittedly authorizing production of gas from pressurized natural reservoirs in the earth, authorize production of the approximate one-half of one per cent of helium gas which is commingled with and a part of the natural gas stream as produced?

STATEMENT OF THE CASE

Essential Facts

Helium is a non-combustible gas found in reservoirs in the Hugoton-Panhandle gas fields of Texas, Oklahoma and Kansas, where it is naturally and randomly commingled with natural gas. It comprises about one-half of one per cent of the gas in such reservoirs. The helium is necessarily produced with and as a component of a natural gas stream and cannot be separately produced or economically separated from the natural gas at the wellhead.

The United States commenced helium extraction in Texas in 1917, and, until 1960, was for practical purposes the sole extractor and seller of separated helium. During those years, the United States always relied on oil and gas leases as authorizing production of helium, and conveying title thereto. Hence, its contracts for helium supplies were made with lessee-producers who owned the oil and gas leases and produced the gas.

Pursuant to the Helium Act of 1960, the United States executed long-term helium acquisition contracts with certain pipeline subsidiaries, which subsidiaries constructed helium separation plants, and separated the helium for sale to the United States.

The District Court after a lengthy trial found that helium gas was covered by the oil and gas leases, which leases intended to authorize production and sale of the gas, including the helium gas, produced from gaseous reservoirs below the surface of the earth. The Court of Appeals affirmed.

As to claims for helium payment by Lessee-Producers, the Court of Appeals held that the pipeline subsidiaries must pay the reasonable value of commingled helium delivered to them by Lessee-Producers. Lessee-Producers conceded that royalty on payment for helium so recovered would be paid by them to the Landowners who held the royalty interests in the leases.

The Landowners, not satisfied with a royalty payment as specified by the leases, seek a determination that the leases do not convey title to the helium gas constituent to the Lessee-Producers.

Subject of Litigation

The fund, which is the subject matter of these interpleader actions, is the proceeds paid by the United States to the Helex Group for helium which they separate from helium-bearing natural gas and sell to the United States under long-term contracts.

Parties

There are three groups of adverse claimants to the interpleaded funds: the Landowners (petitioners here), the Lessee-Producers and the Helex Group.

Nature of the Actions

The claims of the three contending groups present two separate and distinct controversies with different adverse claimants and different issues of law and fact.

One controversy is between the Landowners on the one hand and the Lessee-Producers and the Helex Group on the other. In this controversy, the Landowners claim, but the Lessee-Producers and the Helex Group deny, that the Landowners are entitled to all of the interpleaded funds on the ground that the commingled helium produced with the helium-bearing natural gas is not covered by the oil and gas leases given by the Landowners to the Lessee-Producers. It is this controversy which the Landowners now ask this Court to review.

The other controversy is between the Lessee-Producers and the Helex Group, in which the Landowners have not participated. In this controversy, the Lessee-Producers claim, but the Helex Group denies, that Section 11 of the Helium Act and the rules of law of rate regulation and unjust enrichment entitle the Lessee-Producers to recover out of the interpleaded funds the reasonable value of the commingled helium at the points where we deliver the helium-bearing natural gas into the pipeline systems of the three pipeline companies which are members of the Helex Group. The Helex Group is asking this Court to review this controversy in No. 71-238, *Northern Natural Gas Company, et al.* v. *Mobil Oil Corp., et al., and Ralph Grounds, et al.*, and No. 71-243, *Panhandle Eastern, et al.* v. *Mobil Oil Corp., et al., and Ralph Grounds, et al.*